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IN THE

Supreme Court of the United States

75-199

No. .....

October Term, 1975

WILLIS E. RESSLER,

Petitioner,

-against-

STATES MARINE LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL C. MATTHEWS
Attorney for Petitioner
11 Broadway
New York, N.Y. 10004
(212) DI 4-1936

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1975

WILLIS E. RESSLER,
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-against-

STATES MARINE LINES, INC.,
Respondent.

On Appeal from the United States District Court for the Southern District of New York

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court dismissing plaintiff's claim for maintenance and care for treatment received on account of an eye infection sustained aboard defendant's vessel, although awarding him damages for aggravation of his condition due to defendant's negligence.

The Opinions of the Courts Below

The decision of the United States District Court for the Southern District of New York was simply an oral ruling upon the trial by Judge Edward Weinfeld which is appended hereto (13). The opinion of the United States Court of Appeals for the Second Circuit by Judge Friendly is appended hereto (14).

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided and entered May 6, 1975. The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented for Review

Where a seaman contracts a veneral disease leading to an eye infection, and where the infection is caused and/or aggravated by the negligence of the shipowner, and where all of the treatment for the period during which maintenance is sought is for the eye infection as thus aggravated, and not for the original veneral disease, will he be barred from recovering maintenance on the ground that his condition was caused solely by his own misconduct?

Statement of the Case

Plaintiff was born on August 1, 1947. He never learned to read or write. On July 18, 1967 he got a job as bedroom steward on defendant's vessel, the SS STEEL AR-

CHITECT. It was his first trip to sea. He had never had sexual intercourse before, and was never warned about veneral disease. About three days after the vessel left Bangkok, Thailand, he developed a discharge, for which he received terramycin from the ship's Chief Officer. He was checked at the Public Health Service facility at the next port, Honolulu, on September 15, 1967, but thereafter he had further difficulty, for which he received treatment at the Army Hospital. The STEEL ARCHITECT sailed from Honolulu on September 19, 1967 with plaintiff aboard. He reported to the Chief Officer, who told him he probably had a stye, and sent him back to work. The following day, September 22, plaintiff's eye was sore and swollen, and the Chief Officer applied acromycin ointment. The following day the eye was filled with pus, and it was washed out with boric acid and more ointment applied. Although Chief Officer Hilderbrand kept a copy of "The Ship's Medicine Chest and First Aid at Sea", a U.S. Public Health Service publication, aboard the ship, he never consulted it during his treatment. Neither he nor the Captain radioed for medical instructions, although radio medical information is available around the clock, and although Hilderbrand knew that the discharge which accompanies gonorrhea is loaded with germs, and can cause an infection which might result in blindness.

The plaintiff remained aboard the vessel for nine days after September 22. During this time the eye was very painful, oozing pus, and there was just a little gray ball where the pupil used to be. The whole side of the face swelled up so bad that plaintiff could not eat. About one day before arrival in Panama, plaintiff felt his eye pop. On October 1, 1967, plaintiff was admitted to the Gorgas Hospital. The right eye was swollen shut, with pus exuding.

There was scarring of the cornea to such an extent that it was impossible to see inside the eye. The diagnosis was "conjunctivitis, right eye, secondary to Neisserra gonorrhea, corneal ulceration with perforation". Plaintiff remained in Gorgas Hospital for twenty days. He was then discharged to outpatient status, not fit for duty, and remained not fit for duty and under the care of the Public Health Service right up to the time of the trial in May, 1973.

Defendant paid maintenance to plaintiff until April 20, 1968 and thereafter made no further payments. In September, 1968, an unsuccessful corneal transplant was attempted by the Public Health Service. By this time the plaintiff had developed a secondary glaucoma or increased intraocular pressure of the right eye due to the injury. He is still taking medication to control the glaucoma, and must use two different drops, one three times per day and the other four times per day.

The case was tried before Judge Edward Weinfeld and a jury on May 29, 30, 31, 1973. On May 30, after proof was completed, the Court dismissed plaintiff's claim for maintenance, citing as authority, *Aguilar v. Standard Oil of New Jersey*, 318 U.S. 724 (1943).

The case was submitted to the jury on special interrogatories. The jury found:

(1) No unseaworthiness;

(2) Plaintiff's injury was caused by the negligence of the ship's medical officer;

(3a) Pain and suffering to date: $15,000;

(3b) Future pain and suffering: $15,000;

(3c) Loss of wages to date: $30,000;

(3d) Future loss of wages: 0;

(4) Total damages: $60,000;

(5) Contributory negligence: Yes;
(6) Percentage: 40/;
(7) Verdict: $36,000.

Reasons for Allowance of the Writ

The District Court dismissed the claim for maintenance on the basis of dictum contained in the opinion of Mr. Justice Rutledge in the case of *Aguilar v. Standard Oil Company*, 318 U.S. 724, 731 (1943):

> "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The traditional instances are veneral disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore."

Though recognizing that engaging in sexual intercourse might be just as much a classic predisposition of sailors, especially single ones, as excessive indulgence in alcohol, the Court of Appeals declined to reverse, stating

> "The present case, where any recovery of maintenance would be for no more than a few months in any event, would be a rather poor vehicle for an inferior court to make the appropriately rare prediction that the Supreme Court will no longer abide by what it has clearly said."

But if the amount involved is small, nevertheless the principal involved is of sufficient importance that this Court should consider it, involving as it does a substantial right affecting all seamen. If a decision is unjust, it is no excuse that the injustice is a small one. This Court has never hesitated in granting certiorari in cases where a seaman has been unjustly denied maintenance, and where a broad legal issue is involved. C.f., *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Vella v. Ford Motor Co.*, 43 USLW 4447 (April 15, 1975); *Warren v. U.S.*, 340 U.S. 523.

It is particularly ironic that dictum in the opinion of Mr. Justice Rutledge should provide for the basis for narrowly construcing a seaman's right to maintenance, when in fact *Aguilar* affirmed the liberal nature of the doctrine of maintenance and cure. This liberality has been reaffirmed in *Warren*, *Vaughan* and *Vella*.

The opinion of Mr. Justice Douglas in *Vaughan* summarizes the policy of the law regarding maintenance, 369 U.S. at p. 531-532:

> "Admiralty courts have been liberal in interpreting this duty 'for the benefit and protection of seamen who are its wards.' Id., at 529, 58 S.Ct. at 654. We noted in Aguilar v. Standard Oil Co., 318 US 724, 730, 63 S.Ct. 930, 933, 934, 87 L.Ed. 1107, that the ship owner's liability for maintenance and cure was among 'the most pervasive' of all and that it was not to be defeated by restrictive distinctions nor *'narrowly confined.'* Id., at 735, 63 S.Ct. at 936. *When there are ambiguities or doubts, they are resolved in favor of the seaman.* Warren v. United States, 340 US 523, 71 S.Ct. 432, 95 L.Ed. 502."

Aguilar did not involve a seaman who was treated for a venereal disease. Neither did that case involve a seaman with an eye infection made worse by the negligence of the ship's medical officer. If *Aguilar* is to be read literally so as to bar maintenance for any condition related to venereal disease, then recovery must be denied for cancer of the cervix, which medical research has found to be a venereal disease. Such a result in this enlightened age would of course be absurd.

Lower courts have recognized exceptions to the *Aguilar* dicta. In *Koslosky v. U.S.*, 106 Supp. 653, affirmed 208 F2 957 Judge Skelly Wright awarded maintenance to the libellant who was being treated for a number of conditions, including syphilis. This could only be justified on the basis that the venereal disease was not the sole cause of his condition.

In *Flynn v. U.S.*, 98 F.Supp. 991 (SDNY 1951), libellant was awarded maintenance for treatment for syphilis where the court found that the disease was contracted as a result of improper sanitary facilities on board the ship. This would seem to imply either that not every case of venereal disease involves misconduct or that maintenance will be allowed where there is negligence on the part of the shipowner. Under either theory, plaintiff would be entitled to recover.

The same rule was applied in *San Martin v. United States Lines Co.*, 1963 A.M.C. 935 (SDNY 1960) where the Court awarded plaintiff maintenance and cure despite the fact that a significant part of his condition (an aversion of the ascending aorta of his heart) was the result of a syphilitic condition.

The cases involving voluntary intoxication do not deny maintenance simply because a seaman became intoxicated.

Bentley v. Albatross Steamship Corp., 203 F.2d 270 (3 Cir. 1953), involved a seaman who returned to his vessel so intoxicated that when he fell asleep, he slumped against an unguarded radiator and did not awake, although severely burned. The Court of Appeals for the Third Circuit held that the seaman could recover both damages and maintenance since the voluntary intoxication was not the sole cause of his injury. This case has been cited with approval in *Bartholomew v. Universe Tankships*, 279 F.2d 911, 914 (2 Cir. 1960). Also in point is the case of *Fuentes v. Panama Canal Company*, 146 F.Supp. 303 (SDNY 1956), decided by Judge Levet. Fuentes had a mental disorder, but did not realize that intoxication could plunge him into a deep depression. He voluntarily became intoxicated with disastrous results. Judge Levet awarded him maintenance on the grounds that since he did not know that the intoxication would cause serious mental problems, that his own willful misconduct was not the sole cause of his treatment. Since plaintiff did not know the disastrous results which could occur from contracting gonorrhea, his willful misconduct was not the sole cause of his subsequent loss of vision.

Unless one is to put venereal disease apart and classify it as more venal than intoxication, there is no reason in law to deny maintenance to plaintiff after the jury's findings that the negligence of the defendant contributed to his condition. It should be borne in mind that during his entire period of treatment, the smear test from his urine and urethral discharge were negative for gonorrhea, and that all of the treatment was for the consequences for the eye infection. To suggest that contracting a venereal disease by a 19-year-old seaman on his first voyage to sea is more of willful misconduct than voluntary intoxication to the point of obliviousness as in *Bentley* and *Fuentes, supra*, is neither

just nor realistic. Both can, and should, be excused where such misconduct is not the sole cause of the treatment.

Conclusion

Because a broad legal issue involving the scope of exceptions to the maritime doctrine of maintenance and cure is involved, a writ of certiorari should be granted.

Respectfully submitted,

PAUL C. MATTHEWS
Attorney for Petitioner

Appendix

APPENDIX A
DECISION OF DISTRICT COURT

MR. MATTHEWS: Your Honor, may I request a ruling with regard to the matter that your Honor asked about concerning the question of maintenance and cure.

THE COURT: That one I will answer. I will not submit maintenance and cure to the jury.

I will rely on Aguilar v. Standard 318 U.S. 724, 731, the oil company case 18 U.S. 324 is still controlling law.

MR. MATTHEWS: Then I might respectfully have an exception to your Honor's ruling on the dismissal of that claim.

THE COURT: You may.

MR. WILLIAMS: How do we stand on counsel fees? I think there is reliance on them.

THE COURT: If maintenance and cure is out, the counsel fees go with it.

APPENDIX B
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 721—September Term, 1974.

(Argued April 8, 1975 Decided May 6, 1975.)

Docket No. 73-2069

WILLIS E. RESSLER,

Plaintiff-Appellant,

v.

STATES MARINE LINES, INC.,

Defendant-Appellee.

Before:

FRIENDLY and FEINBERG, *Circuit Judges,*
and LASKER, *District Judge.**

Appeal by a seaman from a judgment of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,* after a verdict, which dismissed the seaman's claim for maintenance and cure and, while finding that defendant's negligence was responsible for loss of the seaman's right eye and awarding substantial damages, made no separate award for loss of future earnings.

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

PAUL C. MATTHEWS, Esq., New York, N.Y., *Attorney for Plaintiff-Appellant.*

ROBERT E. MESHEL, Esq., New York, N.Y. (D'Amato, Costello & Shea, Esqs., of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge:*

Willis E. Ressler, plaintiff in this action for damages under § 33 of the Jones Act, 46 U.S.C. § 688, and for maintenance and cure under general maritime law, see *Harden* v. *Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C.C.D. Me. 1823); *Reed* v. *Canfield*, 20 Fed. Cas. 426, Case No. 11,641 (C.D.D. Mass. 1842),[1] obtained a job in July, 1967 as a bedroom steward on defendant's vessel, the S.S. Steel Architect. Plaintiff was then twenty and his voyage on that vessel was his first trip at sea. About a month into the voyage, after calling at several Asian ports, the ship docked for ten days at Bangkok, Thailand. There Ressler engaged in sexual intercourse on two occasions, allegedly for the first time. On the eastbound voyage he developed a discharge due to gonorrhea, a danger from engaging in intercourse under such circumstances of which he claimed to have been unaware. The first officer administered an antibiotic; there was a conflict of evidence how carefully the officer had warned Ressler about washing his hands after urinating.[2] When the Steel Archi-

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1 In his original complaint Ressler stated a third cause of action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq., for alleged failure to have rendered him appropriate medical treatment. On unopposed motion of the United States under Fed. R. Civ. P. 12(b), the action against it was dismissed since plaintiff had failed to file a claim with the appropriate federal agency prior to commencing the action as 28 U.S.C. § 2675(a) requires.

2 The first officer testified by deposition that he had instructed Ressler to wash his hands carefully. Ressler denied this, although he did admit that the first officer had told him to "try to keep clean."

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tect reached Honolulu on September 15, Ressler received treatment for gonorrhea at a United States Public Health Service Hospital and later at an Army Hospital. The ship, with Ressler aboard, departed Hawaii for the Panama Canal on September 19. Several days later, his right eye became sore and swollen. He brought this condition to the attention of the ship's officer who applied acromycin ointment and washed the eye out with boric acid, but there was evidence from which the jury permissibly concluded that more should have been done. On arrival at Panama on October 1, Ressler was admitted to Gorgas Hospital where the diagnosis was "conjunctivitis, right eye, secondary to Neiserra gonorrhea, corneal ulceration with perforation." After twenty days he was discharged to outpatient status. Defendant paid maintenance and cure until April 20, 1968. On September 30, 1968 a corneal transplant operation was performed at the Public Health Service Hospital at New Orleans; unhappily the operation was not successful and Ressler has no useful vision in his right eye. Thereafter he was hospitalized again but refused further surgery. Secondary glaucoma developed in the eye, which has to be controlled by drops.

Ressler claimed that, as a result of this impairment of his vision, he had experienced difficulty in finding and keeping employment. As against the approximately $1,500 earned on his ill-starred two and a half months voyage on the Steel Architect, his earnings were $2,335 for a part of 1969; when he returned to work about Easter; $3,944 for 1970; slightly more than $2,000 for 1971; $2,237 for 1972; and $1,140 in 1973 up to the date of trial in late May.

Over plaintiff's objection Judge Weinfeld dismissed the claim for maintenance and cure on the authority of the oft-cited dictum in *Aguilar* v. *Standard Oil Company*, 318 U.S. 724, 731 (1943), of which more hereafter, and thus did not have to reach the questions how long the obligation to

provide such benefits would continue, see Gilmore & Black, Admiralty §§ 6-10, 11 and 12 (2d ed. 1975), a point on which Ressler is now aided by *Vella* v. *Ford Motor Co.*, 43 U.S.L.W. 4447 (U.S. April 15, 1975), and how the maintenance liability was related to Ressler's claim for loss of earnings from October 1, 1967, see *id.* § 6-12 at 309. The judge put seven questions to the jury which they answered as follows:

Question 1: Do you find that Ressler has established his claim of unseaworthiness?
'No'

Question 2: Do you find that Ressler has established his claim of negligence?
'Yes'

Question 3: What sum do you find as damages for (a) pain and suffering to date including the nature of his injuries?
'$15,000'.

(b) Future pain and suffering, if any?
'$15,000'

(c) Loss of wages from date of occurrence to present?
'$30,000'

(d) Future loss of wages, if any, he is reasonably likely to sustain?
'Zero'

Question 4: What is the total amount of damages?
'$60,000'

Question 5: Did the defendant sustain its burden of proof on contributory negligence?
'Yes'

Question 6: If the answer is 'yes', what percentage?
'40%'

Question 7: Deducting the percentage from the total amount of damages referred to in 4, what sum do you find plaintiff is entitled to recover?
'$36,000'

Plaintiff's counsel moved to set aside the verdict on the ground that the awards for pain and suffering and the zero award for future loss of wages "were so inadequate as to shock the conscience of the Court." Stating that the conscience of the court was not shocked "in the slightest degree" and that he regarded the result as "eminently fair", Judge Weinfeld denied the motion and entered judgment on the verdict. The sole issues pressed on appeal are his withdrawal from the jury of the claim for maintenance and cure after April 20, 1968, and the jury's failure to make any award for future loss of wages.

In *Aguilar, supra,* 318 U.S. at 731, after expatiating on the broad scope of the shipowner's liability for maintenance and cure ("Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it"), Mr. Justice Rutledge stated:

> Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection.

He added:

> The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.

(Footnotes and references thereto omitted). Plaintiff's counsel calls attention to some authority, notably *Bentley* v. *Albatross S.S. Co.*, 203 F.2d 270 (3 Cir. 1953), which has taken advantage of the Court's qualification with respect to intoxication.[3] Arguably, engaging in sexual intercourse while ashore after a long voyage, especially by an unmarried man as Ressler was, has become—perhaps always was—as much "a classic predisposition" of sailors as excessive indulgence in alcohol. See Gilmore & Black, *supra*, at 290-91. However, there is as yet no authority for disregarding Mr. Justice Rutledge's dictum that when venereal disease is contracted through intercourse, the shipowner is not liable for maintenance and cure. A rather light hearted lower New York court opinion, *Koistinen* v. *American Export Lines, Inc.*, 194 Misc. 942, 83 N.Y.S.2d 297 (N.Y. City Ct. 1948), purported to distinguish the *Aguilar* dictum on the basis that while the plaintiff, who had been injured in Jugoslavia as a result of jumping from a window to escape from the room of a female companion—exit by the door being impeded by her threatening male associate—"did not accompany the woman to her room for heavenly contemplation," he had "abandoned that purpose before consummation", and that in any event the injury did not result from execution of his original sinful intent; what incapacitated him for 36 days was not "venereal disease", whereof Mr. Justice Rutledge spoke, but injury from the jump. The present case, where any recovery of maintenance and cure would be for no more than a few months in any event, would be a rather poor vehicle for an inferior court to make the appropriately rare prediction that the Supreme Court will no longer abide by what it has clearly said.

3 Even the qualification for intoxication has not been followed in all cases. See *Victoria* v. *Luckenbach S.S. Co., Inc.*, 141 F. Supp. 149 (S.D.N.Y. 1956), *aff'd* 240 F.2d 349 (2 Cir. 1957) (*per curiam*).

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We have been considerably more troubled by the jury's failure to award any damages for loss of future earnings. Plaintiff first contends that this is inconsistent with the rest of the jury's special findings. Primarily we note that counsel did not raise the inconsistency point before the district court; as mentioned above, his only objection was that certain of the damages awarded were grossly inadequate. We also emphasize that we are here dealing not with a series of special verdicts under Fed. R. Civ. P. 49(a), but with the validity of a general verdict accompanied by a series of interrogatories under Fed. R. Civ. P. 49(b).

It is not clear precisely in what way plaintiff considers the jury's failure to award him any damages for loss of future earnings to be inconsistent with its other "special findings". In his brief he contends that since the jury found loss of wages in the amount of $30,000 to the date of trial and also "past and future pain and suffering", its failure to award future loss of wages "can be accounted for only if the jury misunderstood or ignored the Court's charge". However, this combination of responses to the interrogatories would not on its face appear inconsistent; the answers are not irreconcilable to an extent that we would feel required, or even permitted, to remand for a new trial, even one limited to the question of future lost wages. The jury quite reasonably could have awarded $30,000 for lost earnings up to the date of the trial as compensation for the period in which Ressler was undergoing treatment prior to his last operation and a reasonable time for recovery thereafter, plus an additional sum for loss of wages during the period in which he could have been expected to be seeking new permanent employment. Viewed in these terms the award for lost wages in the past is not inconsistent with the conclusion that there was no permanent reduction in his future earnings capac-

ity. Similarly, the award of damages for future pain and suffering is not inconsistent with the failure to award damages for loss of future earnings since the jury may quite reasonably have concluded that whatever discomfort Ressler would suffer in the future, the thrice daily use of eye drops would sufficiently reduce the pain as not to interfere significantly with his ability to obtain or keep employment. We have been instructed that:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

A&G Stevedores, Inc. v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

Ressler also contends that even if the answers were not inconsistent, the "uncontradicted evidence" conclusively demonstrated that his future earnings in fact would be lower than they otherwise might have been or, alternatively, that as a matter of law the loss of one eye inevitably decreases a person's earning capacity, particularly when the person is illiterate. It is doubtless true that, although there are many jobs for which ability to use both eyes is not essential, prospective employers prefer to hire persons not so handicapped, if only because of fear over an industrial accident to the useful eye. As indicated above, Ressler gave some testimony that he had encountered difficulty of this sort; moreover that his limited vision had impeded his performance of one of the jobs he had been able to obtain. On the other hand, the depressing effect of this disability is hard to quantify, especially for the long period of Ressler's prospective em-

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ployability, and the jury could have been impressed by the fact that he had had some success in finding different forms of employment.[4] And of course the jury may have disbelieved portions of his testimony. Indeed the entire testimony with respect to his loss of earnings was extremely sketchy. It appears that except for assistance he had rendered his mother on a newspaper route, he had had no other employment prior to the sea voyage. Moreover, although the Public Health Service had marked him "unfit for duty", Ressler admitted that he had never made any inquiry with anyone concerning the possibility of his obtaining another position on a ship, perhaps one limited to intercoastal service. The limitation on earning power due to his illiteracy cuts both ways; this was not the usual situation of a young man likely to progress up the salary ladder. In sum, this is not a case where the "uncontradicted evidence" pointed unerringly to the conclusion that the plaintiff's future earning capacity had been diminished in an amount for which a jury was bound to allow, or where such an award is required as a matter of law.

If we view the case simply as an appeal from a refusal of the district court to set the verdict aside as inadequate, the only ground put to the district judge, we are bound to affirm. The standard for reviewing the refusal of a trial judge to disturb a verdict as inadequate is the same as when he has refused to upset one as excessive. *Caskey* v. *Village of Wayland*, 375 F.2d 1004, 1007-08 (2 Cir. 1967); *Yodice* v. *Koninklijke Nederlandsche Stoomboot Maatschappij*, 471 F.2d 705 (2 Cir. 1972) (*per curiam*), *cert. denied*, 411 U.S. 933 (1973). In that situation we have stated that we are "not to decide whether we would have set aside the

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4 Among others Ressler held positions as a gas station attendant and the night manager of a grocery store; he also worked for a department store and a builder of prefabricated homes.

verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand" and that "[w]e must give the benefit of every doubt to the judgment of the trial judge." *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 806 (2 Cir. 1961) (Medina, *J.*). There was nothing to indicate that the jury was prejudiced against Ressler; its $60,000 verdict before deduction for contributory negligence, considered as a whole, was not ungenerous. Taking everything into account, we cannot find that the experienced judge, who had seen and heard Ressler, abused his discretion in refusing to set the verdict aside.

Affirmed.

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